In the Supreme Court of the United States

OCTOBER TERM, 1924

No. 18

NAMPA & MERIDIAN IRRIGATION DISTRICT, *Appellant*,

vs.

C. STOCKTON, Project Manager of the Boise Project of the United States Reclamation Service, and ALEXANDER MACKAY, Water Users Association, Inc., *Appellees*.

Appeal from the United States Circuit Court of Appeals for the Ninth Circuit.

REPLY BRIEF OF APPELLANT

[illegible]

INDEX.

In the Supreme Court of the United States

OCTOBER TERM, 1924

No. 135

NAMPA & MERIDIAN IRRIGATION DISTRICT, *Appellant*,

vs.

J. B. BOND, Project Manager of Boise Project of the United States Reclamation Service, and PAYETTE-BOISE WATER USERS ASSOCIATION, Ltd., *Appellees*.

Appeal from the United States Circuit Court of Appeals for the Ninth Circuit

REPLY BRIEF OF APPELLANT

HUGH E. McELROY,
Boise, Idaho,
FREMONT WOOD,
Boise, Idaho,
Attorneys for Appellant.

In the Supreme Court of the United States

OCTOBER TERM, 1924

No. 135

NAMPA & MERIDIAN IRRIGATION DISTRICT, *Appellant*,

vs.

J. B. BOND, Project Manager of Boise Project of the United States Reclamation Service, and PAYETTE-BOISE WATER USERS ASSOCIATION, Ltd., *Appellees*.

Appeal from the United States Circuit Court of Appeals for the Ninth Circuit

REPLY BRIEF OF APPELLANT

STATEMENT OF FACTS

1. This controversy is between Appellant and Appellee, Bond, representing the United States. The Water Users' Association was permitted formally to intervene. The Court made its decision upon the motion of Appellee, Bond, to dismiss the complaint.

The decision of the Court was based on the argument under that motion. The Water Users' Association has filed a brief on this appeal. The reference in brief filed by Water Users' Association to contract under consideration and the 1921 contract between the Secretary and the Association in relation to drainage to which this appellant was not a party, tends to confuse the facts in the case. Said last mentioned contract did not mention this Appellant and did not purport in any manner to bind it. The form of procedure in this action was agreed upon between the attorneys for appellant and for the Reclamation Service as a suitable method of presenting this controversy to the Court.

2. We call attention to certain statements of fact in the brief of Appellee, Bond, on page 2, where counsel say:

> "In the beginning, as stated by the District Court, all the Project lands, whether within or without the District, had precisely the same status (R. 33). They were all bound by subscriptions to the stock of the Payette-Boise Water Users' Association, and thereby subjected to a lien for the charges to be imposed by the Secretary of the Interior."

The 40,000 acres of so-called District Project lands were privately owned and subject to the district as a public corporation, before the project was organized. Only part of the landowners were willing to

apply for project water. The lands were later called "Project Lands" because they were situated so that it was feasible to water them from Boise Project when constructed. The Reclamation Service defined the term "Project Lands" as follows (R. 48):

> "*Notes*: The term 'project lands' as used herein refers to lands under the constructed unit of the project and having no water rights from private canals." (R. 48.)

The Government transferred rights in the Project sufficient for 40,000 acres, to the Irrigation District, accepting the obligation of the District for repayment of every dollar they had cost, for the reason that dealing with the individual stockholder in the Water Users' Association, had proved unsatisfactory. We quote from the official statement (R. 49):

> "*Explanatory Statement.* Unless irrigation districts or some form of organization capable of binding all the lands should be formed, it will be necessary to depend upon individual applications or contracts, the making of which is largely optional with the individual landowners. Without district organizations binding all lands, it is estimated that a considerable percentage of the landowners will avoid paying the government for a water right by picking up waste water, or securing water in some other way or holding the land for speculation without irrigation. Consequently, it is estimated that a charge of approximately $70 per acre will be necessary

if districts are organized and contracts made, binding all irrigable project lands to pay for a water right, and a charge of $80 per acre without such organization. That is, it is estimated that a payment of $70 per acre from all project lands guaranteed by an irrigation district having the taxing (fol. 112) power enabling it to assess all the lands would bring in a total revenue or payment equal to the amount which would be collected by a charge of $80 per acre upon such of the project lands as the owners thereof may elect to purchase water rights for."

The authority of the Secretary to make the contract was found in Section 5 of the Reclamation Extension Act.

> "*Provided*, That whenever any legally organized water users' association or irrigation district shall so request, the Secretary of the Interior is hereby authorized, in his discretion, to transfer to such water users' association or irrigation district the care, operation, and maintenance of all or any part of the project works, subject to such rules and regulations as he may prescribe."

3. The statements on pages 6, 7 and 8, particularly the comments of the District Court, are not justified by this record. "The necessity for drainage" did not first arise in the District. Neither does Appellant make any claims on the outside Project lands for drainage. It is the duty of Appellant under Idaho laws to provide drainage for all of its

lands. Before the Project was completed and its cost determined, the Secretary had jurisdiction and did construct drainage systems as a part of the cost of the Project, in three irrigation districts, two of which lay entirely outside of the Project. The Project lands, which constitute the highest lying lands on Boise bench, drained down on these irrigation districts. We listed these drainage works on page 25 of our Brief in chief. The first work constructed was in Pioneer District. (See Pioneer District vs. Stone, 23 Idaho 344, 138 Pac. 382.) These drainage works were continued into appellant district and the jurisdiction of the Secretary and of the District to make the contract was reviewed in the first case of Nampa & Meridian Irrigation District vs. Petrie, 28 Idaho 227, and 153 Pac. 425, then appealed to this Court and dismissed.

ARGUMENT

I.

How May Drainage Be Authorized and the Charges Collected After the Construction Cost of the Project has Been Fixed by Public Notice?

Examination of the Brief of Appellee, Bond, the decisions of the District Court and the Circuit Court of Appeals, and the public documents of the Reclamation Service, together with the decisions of the Idaho Court in Pioneer District vs. Stone and the two Petrie cases, and the Circuit Court of Appeals

for the Eighth Circuit in case of the United States vs. Ide (277 Fed. 382) conclusively show that until 1921 the courts and the Secretary of the Interior uniformly held that drainage construction was properly classified as a construction charge of a reclamation project, and that after the construction charge on a reclamation project "has been fixed by public notice," the Secretary of the Interior may not impose the cost of drainage charges upon the landowners of a project "except by agreement between the Secretary of the Interior and a majority of the water right applicants and entrymen, to be affected by such increase, whereupon all water right applicants and entrymen in the area proposed to be affected by the increased charge shall become subject thereto." (Sec. 4 Reclamation Extension Act of 1914.)

2. The construction charges for Boise Project were fixed by public notice July 2, 1917, and included, of course, the cost of all drainage works as well as other structures, constituting the investment of the Government in Boise Project. In the public notice, Secretary Franklin K. Lane said:

> "14. *Expenditure for drainage and distributing works.*—The construction charge as announced herein includes the sum of approximately $302,000.00 expended and to be expended after January 1, 1917, for drainage and distributing works. The expense of any further work of this kind which may in the future be necessary, must be met by the, landowners

through an increase in the construction charge herein announced, or otherwise." (Italics are ours.)

What the words, "or otherwise," might mean does not appear. But Section 4 provides for "an increase in the construction charge" which may be lawfully required from the landowners.

3. The position assumed by Secretary Fall in 1921 amounts to a complete reversal of the policy of his predecessors regarding drainage. The jurisdiction of the Secretary to construct drainage was implied from the Federal Statute. The first drainage attempted by the Government anywhere on an irrigation project was in the Pioneer Irrigation District and was charged to Boise Project. It may be presumed that the district merely accepted the contract offered by the Government providing for drainage as a construction charge under the irrigation laws of Idaho. The same was true of the drainage in appellant district. Before the Government began any drainage, the right both of the Secretary and the District was determined in the case of Pioneer Irrigation District vs. Stone. The same course was followed in the first case of Nampa & Meridian Irrigation District vs. Petrie, *supra*, which involved validity of the contract. The attorneys for the Reclamation Service appeared as an attorney for the Districts in each of these cases. The State Supreme Court upheld the jurisdiction of both the District

and the Government to construct drainage as a construction charge under irrigation district law, at the instance and solicitation of the Government, through its attorney. When dissatisfied parties appealed the Petrie case to the Supreme Court of the United States both the General Counsel and the District Counsel for the Reclamation Service appeared as attorneys for Appellant District and secured a dismissal of the appeal. It is interesting to notice the declaration of law which the Government was defending when the Petrie case was appealed to this Court, which was as follows:

The Court said:

> "Section 2400, Rev. Codes, provides that notice shall be given to each of the landowners of the time and place the board of directors will make the assessment of benefits, when a hearing will be given to each owner of land within the district, and his land will be classified and assessed according to benefits received. Should any landowner make objection to said assessment or any part thereof before said board, and said objection is overruled by the board, and the landowner does not consent to the assessment as finally determined, such objection shall, without further proceedings, be regarded as appealed to the district court and to be heard at the said proceedings to confirm as aforesaid. Like objections may be urged by landowners who may be affected by the drainage system or stored supplemental water rights." (Nampa &

Meridian Irrigation District vs. Petrie, 153 Pac. 428.)

This decision assured the individual landowner that he could not be required to pay any drainage charges unless they were voted by the District and the benefits were confirmed by a Court and he was given opportunity to challenge the assessment in that proceeding. In Nampa & Meridian vs. Petrie, 223 Pac. 531, cited on pages 28 to 30 of our brief in chief, the Court merely enforced the decision made in the first Petrie case, which was secured at the instance of the attorneys for the Reclamation Service.

4. When the Secretary brought an action in the Federal Court to secure judicial sanction for the construction of drainage works, in case of United States vs. Ide, the Circuit Court of Appeals for the Eighth Circuit merely reiterated these Idaho decisions.

5. The decisions of both the District Court and the Circuit Court of Appeals in the case at bar expressly recognize that the Secretary might, if he chose, construct the drainage under consideration by increasing the construction charges as provided in Section 4. The District Court stated the law thus: "The Government has fixed the construction charge upon this system, under the law, and it cannot now add to it without the consent of a majority of all the water users." (R. 35.)

But the Court then proceeds to make an argument which ignores the law itself and assumes a new rule

of statutory construction, under which the terms of the statute may be construed as purely optional. The Court says (R. 35):

> "If, in the management of this great system, with its hundreds of miles of canals, its dams, and gates, and a multitude of devices for diverting, impounding, carrying and distributing water, it cannot in an intelligent way provide for new conditions, or in the light of experience make new and better provisions for old conditions, *by charging the reasonable expenses thereof to maintenance and operation*, the value and efficiency of the system would be greatly impaired. Surely such a result could not have been intended by Congress, or by the parties to the contract here involved." (Italics are ours.)

With the italicized portion stricken out, we heartily concur in the foregoing statement. But is not this just what the Congress of the United States thought when it provided and declared an exclusive method to be followed by the Secretary in meeting an increased construction charge after the cost of the project had been determined?

6. The Circuit Court of Appeals stated the matter thus (R. 58):

> "If not provided for in advance, as was the case here, it can only be provided for by *agreement with a majority of the landowners affected*, or by a maintenance and operation charge." (Italics are ours.)

Here is an admission that drainage construction does increase the construction charge and that said Section 4 does provide that the necessary cost should be authorized and collected in the manner there provided. Probably it never occurred to the Court that the procedure adopted by this statute was not even experimental but is the means by which all irrigation districts and co-operative irrigation systems in the arid regions are managed, and that it is both practical and a demonstrated success. The Court ignores the mandatory provision of this statute and instead of *construing* the statute attempts to give a reason for *nullifying* it. The Court said:

> "*The prosecution of the present suit* gives little promise that the necessary consent could be obtained, but the *power of the Secretary to conserve and protect* the property under his charge is not dependent upon any such consent."

Of course, it is not true that this drainage system will either conserve or protect any of the property of the United States under the charge of the Secretary of the Interior. This Court can take judicial notice that the irrigation canals and reservoirs constructed with public money are all situated above the lands to be irrigated and do not need to be either conserved or protected by drainage works. The drainage works are situated on the low-lying lands, miles away from the irrigation works. The suggestion that the drainage works will conserve or protect the irrigation

works is absurd. In any event, appellee should be required to prove his defense. But suppose we concede it all! *Section 4 provides an exclusive mode of procedure which has proved adequate for the purpose everywhere.* In fact, outside the Reclamation Service of the United States 99 per cent of irrigation works are managed by a majority of the water-users.

In mandatory language, Section 4 declares that "no increase in the construction charges" can be made except with the consent of a majority of the landowners. We assert that Congress meant just what it said, and that the jurisdiction granted to the landowners after the Project has been completed, is just as sacred as that granted the Secretary.

We think the courts should construe the law and leave to engineers the practical operation of irrigation projects.

7. We submit that the Court decision and the records of the Department of the Interior indicate that the Reclamation Service has been practically forced into a false position through the interference of the District Court, in the management of Boise Project. In the long drawn out litigation between the Water Users' Association and Appellee, over construction charges of Boise Project, the Court delivered two "advisory opinions" without directing judgment. (263 Fed. 734; 269 Fed. 159.) It was the avowed purpose of the Court as stated in the de-

cision, to bring about a compromise. While the Court enforced very strictly the right of the Secretary to exercise "judgment and discretion" in the case at bar, in that case it let down the bars completely and discussed and criticized construction charges as if no discretion were vested in the Secretary prior to public notice. The Court went to the point of actually discussing questions of future drainage subsequent to the opening of the Project and *advised* the Reclamation Service how it might possibly proceed, wholly ignoring the provision of Section 4 of the Reclamation Extension Act. The Court said:

> "Seepage is one of the natural incidents of operating the system, and it would seem to be plain that the necessary expense of providing drainage to prevent damage therefrom is quite as naturally to be covered by revenues collected for *operation* and *maintenance* as any other expense to prevent damage from operation. The state law also establishes a legal system for the distribution and collection of the necessary cost of drainage. If there be any doubt as to the practicability of either of these methods of securing such funds as may from time to time be needed, I see no reason why the settlers could not be required, at the time they apply for water rights, expressly to consent to such assessments as may become necessary for the purpose."

Here we have the original suggestion which has ripened into the present controversy.

The case was held without judgment until July, 1921, when the contract found on pages 19 to 31 of the Record was stipulated between these parties. The distinguished engineers of the Reclamation Service had theretofore treated drainage construction as a construction charge. Although the Court suggested that "it would seem to be plain" that drainage expense might be so charged, they refused to rely on that construction of the law, but accepted the suggestion that if they were in doubt "*I see no reason why the settlers could not be required, at the time they apply for water rights, expressly to consent to such assessments as may become necessary for the purpose*," and prepared this drastic contract, which provides:

> "11. It is hereby stipulated and agreed that an amended form of water right application to be provided for and required under the decree in said suit shall contain a provision expressly agreeing to the payment for future drainage work on the said Boise Project as an operation and maintenance charge." (R. 22.)

Under this agreement, which was merely the act of the attorneys and officers of the Water Users Association and not of the individual landowners, instead of paying only the operation and maintenance chargeable by law under Section 5 of the Extension

Act, the individual landowner was compelled to make a new contract including therewith drainage construction.

The decree undertakes to enforce said contract against the Association members—but not against the District—as follows:

> "That all of the members of plaintiff upon said Boise Project within said first constructed unit or division shall, on or before sixty days from the date of this decree, execute and deliver to the plaintiff association who shall in turn approve, execute and deliver to the Project Manager of the Boise Project, a water right application in form as that attached to said stipulation and supplemental contract, forming a part of this decree as aforesaid." (R. 30.)
>
> "It is further ordered and decreed that after the expiration of sixty days from the date hereof the Project Manager may, in his discretion, *decline to furnish water to any member of the plaintiff Association* for lands upon said first constructed unit or division *outside of the organized irrigation districts* so long as such member neglects or refuses to execute said water right application as aforesaid." (R. 31.)

Under this judgment and contract, the right of the Secretary to collect drainage as a maintenance charge rests upon the contract of the Association backed by the individual contract of its members. There is nothing to suggest that either the legal or engineering advisers of the Government had changed

their minds as to the status of this expense. The District was in Court as a party to the action. It was treated as having no interest in the proposed drainage. The Supplemental Decree expressly recites that the decree between the Association and the Government "contains no provision disposing of the case as to other parties, and all parties through their respective counsel, now consenting that a supplemental or amendatory decree may be entered on the evidence heretofore adduced," etc., (R. 32) judgment was entered for this appellant.

8. On page 9 of Brief, after quoting from Sections 4 and 5 of the Extension Act, counsel say:

> "Neither section throws *any light* upon what are to be considered charges of the one kind or the other."

Will examination of the Statutes justify this amazing conclusion? "Construction charges" are mentioned in Section 4, and Section 5 provides "that in addition to the construction charges." Section 5 speaks of an "operation and maintenance charge based upon the total charge of operation and maintenance of the Project, or each separate unit thereof, and such charge shall be made for each acre-foot of water delivered," which charge is "in addition to the construction charge."

Public Utilities Commissions classify such charges under statutes no more explicit. If necessary they have hearings and make decisions based on testi-

mony. As is well known, the Secretary of the Interior has officially recommended to the President that laws be enacted under which all Government Projects shall be ultimately turned over to irrigation district organizations, although that form of management will be controlled completely by a majority of the landowners exercising the same jurisdiction as is recognized in Section 5 of the Extension Act. We assert that neither this Appellant nor the landowner on the Project who goes into Court to maintain his property rights under the provisions of said Section 4 should be subjected to contemptuous treatment.

We ask this Court to declare the legal effect of Section 4. *Are the provisions of said Section mandatory on the Secretary?*

II.

Did Appellant Agree to be Bound by the Decision of the Secretary in Fixing Operation and Maintenance Charges?

On page 20 of Brief, it is claimed that under the terms of Section 12, whereby the appellant agreed to pay for its Project lands, the same operation and maintenance charges as were paid by similar lands of the Boise Project, the use of the words "as announced by the Secretary of the Interior" constitute a complete *waiver* of the right of the District to insist that the Secretary of the Interior shall perform

his official duty in the manner provided by law. No authorities are cited. We think that a mere statement of the contention furnishes a complete answer. The contract was the official act of the Secretary of the Interior as an officer of the Government. The annual announcement of the operation and maintenance charge is one of his official duties. Is it fair to claim that when he performs such duty in violation of law, those who have contracted with the Government are without remedy or recourse? Appellant did not contract with reference to a pending dispute or for the purpose of arbitration. Counsel admit, however—

> "It may be admitted, of course, that if the Secretary in bad faith or by an abuse of discretion announced as an operation and maintenance charge an item of expense which, as a matter of law and by clear and definite decisions, was a construction expense, the District would not be bound to accept his decision."

We have specifically alleged that the work to be performed and for which the levy was made consisted of the construction of a drainage system and constituted a construction charge. If this allegation is true, it is a direct impeachment of the official act of the Secretary and a charge that he has violated the law. We say it is a direct violation of law, "bad faith" and "abuse of discretion" to classify drainage construction in violation of the statute. We did

not contract for a "determination" by the Secretary but to pay a charge defined by statute which he was to announce in the official performance of duty as a public officer.

III.

The District as a Unit of the Project.

Under Subdivision 4, pages 21 to 27, counsel discuss the claim of Appellant as a "unit" of the Boise Project. We think this claim can be determined from an inspection of the contract. Why did the Government contract with the District at all? It was because it was a suitable organization and already had jurisdiction over its project lands for irrigation and drainage. Therefore the Government relinquished jurisdiction over all of the individual land owners in the District. The Government at this time proposes a contract under which this District will be represented as a unit of the constructed project in its joint management and control under terms of recent relief legislation. Section 5 of the Reclamation Extension Act recognizes that a Project may be divided into separate units. The contract provides for a pro rating of operation and maintenance charges. The District is to pay the part thereof properly charged to the interest it has purchased in the water rights. The transfer covers sufficient water for every unirrigated acre of land in the District. We respectfully submit that the terms of the contract itself sufficiently indicate that

the Secretary deliberately and intentionally constituted the District as a unit within the meaning of said Section 5, since otherwise he had no jurisdiction to make the contract at all. The complaint alleges that the proposed drainage is entirely outside of the District. Hence it would not be a proper charge against the lands of the District as a separate unit of the Project even if drainage were an operation charge, since the pleading admits that no benefit whatever will accrue to any of the lands of the District by reason of the drainage under consideration. (Section 10, p. 2, Record.)

The last Petrie case (p. 30 of Brief) the Idaho Court said:

> "When the statute provides that land within an improvement district may be assessed for the cost of the improvement in accordance with benefits derived it means benefits derived from the improvement. Where the assessment is for the drainage project, it must be based on benefits derived from it, and not on benefits derived from irrigation."

CONFLICT BETWEEN THE DECISIONS OF FEDERAL AND STATE COURTS.

The Secretary made this contract with an Idaho public corporation, created by State law and necessarily amenable thereto. Counsel for Appellee seeks to belittle the decisions of the State Court in relation to State law. It is a matter of common knowledge

that the District must respect the State law in assessing beneftis and levying taxes. Under the decision of the State Supreme Court in Petrie Cases, any land owner in this district may enjoin the District from proceeding contrary to that decision. We respectfully assert that this is one of the cases where the Federal Courts should give great weight to the decision of the State Court. In fact, the decision of the State Court ought to be controlling, since the Government of its own choice and election has deliberately dealt with a State public corporation. Furthermore, the State Court ought to be very familiar with the subject under consideration.

We quote from Volume IV Encyclopedia of U. S. Supreme Court Reports:

> (P. 1051): "Ordinarily the decisions of the State Court are not to be regarded as laws of the State within the meaning of the Acts of Congress. But where a course of decisions, whether founded upon statutes or not, have become rules of property as laid down by the highest courts of the State, they are to be treated as laws of the State by the Federal Court." (Citing cases.)
>
> (P. 1053): "In order for State decisions to be binding on the Federal Court upon the ground that they construe State statutes, they must, in fact, present a case of statutory construction, and must not be confined to the decisions of questions, which are, in effect, questions of general law." Cross vs. Allen, 141 U. S., 528, 538, 35 L. Ed. 843; Cahen vs. Brewster, 203 U. S.,

543, 544, 51 L. Ed. 310; Adams Express Co. vs. Ohio, 165 U. S., 194, 219, 41 L. Ed. 683. "The question as to the construction of a statute must be finally at rest in the State Court in order for the Federal Court to be bound by their decisions. Thompson vs. Perrine, 103 U. S., 806, 817, 26 L. Ed. 612."

(P. 1053-4): "Thus the Federal Court in interpreting a State statute will form an independent judgment as to the meaning of the State law, when there is no binding construction of such State statutes by the Court of last resort of the State, but only when the case imperatively demands it." Pelton vs. National Bank, 101 U. S., 143, 144, 25 L. Ed. 901; Michigan Cent. R. Co. vs. Powers, 201 U. S., 245, 291, 50 L. Ed. 744; Coulter vs. Louisville, etc., R. Co., 196 U.S., 599, 49 L. Ed. 615.

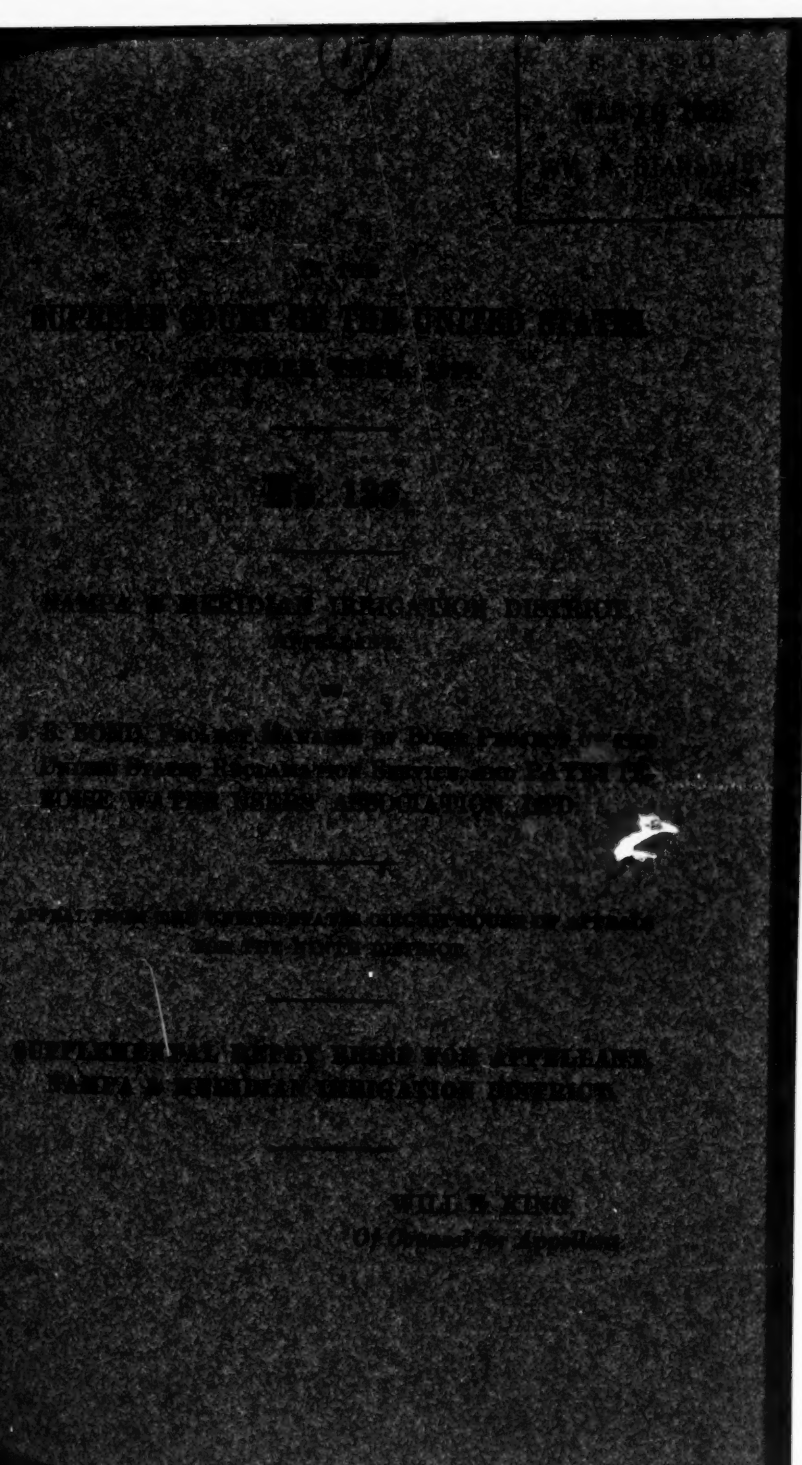
(P. 1055): "When the Supreme Court of the United States has first decided a question arising under State law, it is not bound to surrender its convictions on account of a contrary decision of a State Court, though they will usually do so in cases involving property rights dependent upon the construction of local statutes." Roberts vs. Lewis, 153 U. S., 367, 38 L. Ed. 747; Supervisors vs. U. S., 18 Wall, 71, 82, 21 L. Ed. 771; (and other cases).

We respectfully submit that in dealing with the Boise Project and with irrigation districts contracting for water rights therefrom, the Secretary is bound by the laws of Idaho relating to the jurisdic-

tion of irrigation districts and the assessment of the cost of construction charges together with the decisions of the Supreme Court in the case of the Pioneer Irrigation District vs. Stone, and the two Petrie cases, and will not be permitted to require an irrigation district to pay for drainage construction which does not benefit the lands of the District or which is imposed as an operation and maintenance charge of an irrigation project.

Respectfully submitted,

HUGH E. McELROY,
FREMONT WOOD,
Boise, Idaho,
Solicitors for Appellant.



INDEX.

Table of Cases.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1924.

No. 135.

NAMPA & MERIDIAN IRRIGATION DISTRICT,
APPELLANT,

vs.

J. B. BOND, PROJECT MANAGER OF BOISE PROJECT OF THE UNITED STATES RECLAMATION SERVICE, AND PAYETTE-BOISE WATER USERS' ASSOCIATION, LTD.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH DISTRICT.

SUPPLEMENTAL REPLY BRIEF FOR APPELLANT, NAMPA & MERIDIAN IRRIGATION DISTRICT.

Statement.

The extraneous matter brought into the discussion of this case seems to have occasioned some confusion of thought. In the briefs of appellees, and especially in the oral argument, many of the facts as applied to the issues are so inac-

curately stated as to be highly misleading. The indulgence of this Honorable Court is therefore asked that we may present this our supplemental reply brief, with a view to aiding in determining the law and facts involved.

The motion to dismiss necessarily concedes the accuracy of all the material averments in the bill of complaint. We are justified in assuming, and do assume, that this cause will be determined upon the facts presented by the record, unaffected by extraneous matters.

Facts—Issues.

The Boise Project, herein called "Project", embraces about 165,000 acres. These lands are situated in Boise Valley and substantially all lie between Boise and Snake Rivers and derive their water supply from the Boise River. The water is supplied and its distribution regulated by two reservoirs, the larger being known as the Arrow Rock Reservoir, situated on the Boise River about 40 miles above the Project. The other, known as the Deer Flat Reservoir, is located in the southwest part of the Project on the high lands near Snake River. The Arrow Rock Reservoir waters are impounded by a dam in the Boise River, while the Deer Flat Reservoir is within the Project and receives its water through a feeder canal taken out of the Boise River.

For convenience of the Court copies of official maps from the Reclamation Service are furnished herewith, showing the location of all streams, reservoirs, canals, and much other data essential to a proper understanding of the cause presented—of all which it is assumed the Court may take judicial cognizance. From these maps it will be observed

that only a small part of the lands within and under control of the appellant district are below the Deer Flat Reservoir, and that the district lands drain northwest towards the Boise River. The Golden Gate, Wilder Arena, and Deer Flat Sections, mentioned in paragraph 10 of bill of complaint (Tr. p. 2), are in the lower half of the Project, below the Deer Flat Reservoir, and also drain northwest and cannot (under the laws of gravitation) be affected by seepage from irrigation within appellant district. Under the irrigation-district laws of Idaho, the lands within the district and over which the District may, within its legal scope, have control are not necessarily contiguous. Less than 9,000 acres are below Deer Flat Reservoir and, assuming the seepage to follow in the direction of the Government canal taken from the Deer Flat Reservoir, the possibility of these lands contributing to the necessity for drainage is reduced to a minimum.

For the Court's convenience the clerk is supplied with copies of "Handbook of Irrigation Laws" (by King and Burr). It will be observed that under the Irrigation District Laws of the arid States irrigation districts are *quasi*-municipal in character, similar in corporate authority to school districts, but much more extensive in their scope.

The appellant, Nampa-Meridian Irrigation District (herein referred to as "District"), is a *quasi*-municipal corporation having for its purpose the management, control, and distribution of the water supply essential to the successful farming of the lands within its confines. This District was organized and in operation under the laws of Idaho before the Boise project was undertaken and has a prior right to a water supply for the irrigation of 25,000

acres of land. This supply was received by means of its canals taken directly out of the Boise River, constituting what are known as "the old water rights". As a supplement to these old water rights, the District purchased, under what is known as the Warren Act (Tr. p. 9, par. 9), additional water to meet the late-season shortage in connection with its old rights. This water, however, and that of the "old rights" were used without separation from the regular water rights acquired from the Government for certain other lands in the District previously arid.

After the construction of the Arrow Rock and Deer Flat reservoirs, the Nampa-Meridian Irrigation District, desiring, in addition to said supplemental water supply, the drainage of a considerable acreage, negotiated with the U. S. Reclamation Service for the required drainage and for the purchase of the supplemental water supply described. This resulted in a contract therefor executed June 1, 1915, between the Government and the District, referred to in the complaint as Exhibit A (Tr. p. 5). Under this, the first contract, the District agreed to pay $266,000.00 or 266/557th of the *estimated* cost of drainage system for the Project, being its agreed proportion of the drainage for the entire Project, estimated to cost about $557,000.00. This drainage system was requested by and constructed for the Project and District.

The $70.00 per acre payments provided for in the District contract cover all charges for its 2/7ths of the drainage system of the entire project; the District further agreeing (Tr. p. 8, par. 4) that after construction it "will maintain said drainage system in good serviceable condition at its own expense * * *." This provision would seem to obviate the necessity for any notice for operation and maintenance on account of

the upkeep of the drainage when constructed. In this connection let it be noted we do not question that where no provision is made by water users for the care, upkeep, operation and maintenance of a drainage system after once constructed (as was done here), charges for the necessary care and upkeep, cleaning out of drains, maintaining the banks of the drainage canals, etc., may be charged as operation and maintenance—as in the case of the maintenance of the constructed canals for conveying water to place of distribution—but this *may not be done with respect to cost of the construction of the drainage canals in the first instance.*

After the delivery of the water by the Reclamation Service to the head of the District's main distributing ditches, the District becomes the exclusive manager and operator of the system through which water is distributed to the lands within its boundaries; also the collector of all annual installments on construction charges, together with operating and maintenance charges as they become due, the assessments for payment of which are levied and collected under the irrigation-district laws of Idaho and by the District paid to the Reclamation Service.

The District also agreed to "withhold the delivery of water from such of the lands in the District as may be in default in the payment of said *operation* and *maintenance* charges." No authority is designated, authorizing the Reclamation Service to shut off the water supply in case of default in deferred payments. The power to shut off the water in case of default in such, or in any overdue payments, rests solely with the District itself. Nor is there any provision in the U. S. Reclamation laws authorizing the collection of funds due the Government from the District on construction or other charges,

except the provision in Section 6 of the Reclamation Extension Act, which reads:

> "* * * no water shall be delivered to the lands of any water right applicant or entryman who shall be in arrears *for more than one calendar year* for payment of any charge for operation and maintenance or any annual construction charge or penalties."

As a result of the irrigation system of the Boise Project it appears that the water table has been rapidly rising in portions of the project *outside* the Nampa and Meridian Irrigation District, on the lower half of the project and below the District, "particularly the Golden Gate, Wilder Arena, and Deer Flat sections" (Tr. 2, par. 10), being substantially all below and not affected by irrigation of lands within the District. (See maps—topography.) The Secretary accordingly deemed it advisable to extend the construction of the drainage system and has so authorized. But in place of directing the expense of constructing this additional drainage system to be charged against the Project as a "construction charge," the Secretary has designated it as "operation and maintenance" charges, is proceeding to collect on that basis, and on February 15, 1921, issued a public notice to that effect.

All "operation and maintenance" charges have been paid by the District, *except* that part, claimed as such, expended and proposed to be expended in the *construction of drainage works*. The proposed drainage works are for the exclusive benefit of lands outside the district and for the benefit of other sections and units from which the District will receive no benefit.

No part of the sum so demanded of the District, men-

tioned herein and of which the District here complains, has been or will be used for the maintenance or operation of the canals, reservoirs or dainage works within the District for its benefit—its use is to be for a new drainage system, additional to the drainage system already constructed pursuant to the District's contract "A." The District refuses to pay for this additional drainage charge whether designated as "construction charges" or under the misnomer "operation and maintenance." Because of this refusal, the appellee, Bond, who is in charge of the Project for the Government, threatens to turn off, and refuse the delivery of, the water purchased for the lands within the District, claiming to act under the contract mentioned.. Hence this suit.

ARGUMENT.

Our contention, in a nut shell, is this: We have not contracted to pay the sums in question, and that they have been designated "operation and maintenance charges" as a subterfuge and in order to make a color of right for the collection thereof from the District. This is a violation of our contract, is not necessary to the success of drainage for the Project, and is contrary to the irrigation and drainage law and institutions of the State of Idaho, as we shall show.

This case then involves the construction to be placed upon the words "operation and maintenance" or what charges may be designated as such, as distinguished from "construction charges."

If there is any distinction in meaning between "construction" and "operation and maintenance" such as gives these terms any significance or legitimate place in a contract, we submit that charges for the same kinds of building job can-

not be "construction" today and "operation and maintenance" tomorrow simply because, meanwhile, a contract which has been made which purports to obligate certain landowners to pay "operation and maintenance" charges. Contracting parties are not presumed to use terms in a manner so meaningless or vacillating.

The first attempt at distinguishing these two expressions under the Reclamation Act appears in the case of *Baker vs. Swigart* (196 Fed., 569; reviewed 199 Fed., 865; *affirmed* 229 U. S., 187; 57 L. Ed., 1143), in which it was *held* that during the interim between the commencement of construction work and the issuance of the public notice announcing the completion of a unit or units of a project, the expense incurred in the operation of the irrigation works while being completed would properly come under what are termed "operation and maintenance" charges, which the owners of the lands are obligated to pay under their water-right subscription contracts.

Later, drainage systems were found essential to the successful completion and operation of the reclamation projects. The cost of this class of reclamation from the outset and until the issuance of the public notice of 1921 (Exhibit C) was charged to and carried in the "construction charge" account. It was so understood at the time of entering into the contracts (Exhibits A and B) between the Government and the District, and thereby impliedly so construed and contained therein. The proportionate part of the drainage to be paid by the District under its contract was included in said contract as "construction charges" and not as "operation and maintenance charges," and the District has been paying, and the Government receiving, all moneys due therefor as such.

It would thus seem too clear to admit of serious doubt that the statement in the contract (Tr. p. 11), "The project lands in the district shall pay the same operating and maintenance charge per acre as announced by the Secretary for similar lands of the Boise Project," etc., was understood by all concerned to have reference only to "operation and maintenance", not only as applied by the Supreme Court of the United States in Baker *vs.* Swigart, 229 U. S., —, but as the understood and recognized policy of the Government invoked by it throughout the entire history of the Reclamation Service—the conclusive proof of which will herein later appear.

The parties to the contract are also presumed to have had in mind the provisions of the Reclamation Extension Act of August 13, 1914 (38 Stat., 686), with subsequent amendments, which, with its expressed limitations, all became as much a part of the contract as if specifically stated in it. Section 4 of this Act expressly states (all italics in this brief being ours):

> "That no increase in the construction charges shall hereafter be made, after the same have been fixed by public notice, except by agreement between the Secretary of the Interior and a majority of the water-right applicants and entrymen to be affected by such increase. * * * Such increased charge shall be added to the *construction charge* and *payment thereof distributed over the remaining unpaid installments of construction charges.*"

Further provision is made for the manner of payment, which manner is inconsistent with, as well as impracticable under, the public notice herein complained of.

Less than a year later, and prior to the execution of either of the contracts with the District, we have the Act of March 3, 1915 (38 Stat., 861), placing further restriction upon the imposition of additional charges, a part of which reads:

> "No work shall be undertaken or expenditures made for any lands, for which the construction charge has been fixed by public notice, * * * *unless and until valid and binding agreement to repay the cost thereof shall have been entered into between the Secretary of the Interior and water-right applicants and entrymen affected by such increased cost,* as provided by Sec. 4 of the Act of August 13, 1914, entitled 'An Act extending the period of payment under the reclamation projects, and for other purposes.' "

Section 5 of the Reclamation Extension Act provides, *in addition to the construction charges,* for the payment of

> "An operation and maintenance charge based upon the total cost of operation and maintenance of the project, or each separate unit thereof, and such charge shall be made for each acre of water delivered, but each acre of irrigable land, whether irrigated or not, shall be charged with a minimum operation and maintenance charge based upon the charge for not less than one foot of water * * * "

This provision was merely declaratory of the law as applied by this Court in Baker *vs.* Swigart, *supra,* removing thereby all doubt concerning the legality of the policy of the Reclamation Service on the subject. It will be noted that these terms, "operation and maintenance", as there stated, have reference to the expense incurred in water delivery. Such

being the basis of the whole charge so designated—and were manifestly there used in the sense applied in the Baker-Swigart decision and had been universally recognized prior to its enactment. No different application of these terms was ever thought of or brought into question in any manner until the issuance, February 15, 1921, of the public notice here involved.

Authority to Issue the Public Notice.

Limited to Lands Owned by Stockholders in Intervener's Association.

The authority of the Secretary to issue and enforce the terms of the public notice involved is not questioned, in so far as the intervener, the Payette-Boise Water Users' Association, may be concerned. The intervener does not challenge it, nor do we, *as applied to it*. But the authority does not extend to any other person or organization named in the record.

Why the Jurisdiction in This Instance, and Why Limited?

Because the intervener corporation has by contract (Tr., Ex. D, Sec. 10, p. 22) in express terms authorized it. To this contract appellant was in no respect a party and has not given its consent thereto; and the District's consent thereto cannot be implied, either under the reclamation law or under the law governing contract relations. This authorization, so far as the intervener association is concerned, expressly ap-

pears in Exhibit D of the bill of complaint, beginning on page 19 of the transcript. Attention is also called to Exhibit A thereof (Tr. p. 26), which must not be confused with appellant's contract "A" on page 5 of transcript. This unusual provision in the contract between intervener's association and the Government, with subsequent developments, reflects much light upon why the confusion on the challenged action of the Secretary.

The District was in no sense, either directly or indirectly, a party to the "Exhibit D" stipulation. But because of the statement in the District's "Exhibit A" contract that it would "pay the same operation and maintenance per acre as might be announced" for similar lands of the Boise Project, etc., it seems to have been erroneously assumed that the Secretary is authorized to change the well-established meaning and usage of the words "operation and maintenance charges" so as to include such construction work as he might designate. The quoted provision of appellant's contract, upon which appellees seem to rely, was entered into June 1, 1915, or more than six years prior to the intervener appellee's "D" stipulation (Tr. p. 19).

Not until intervener's "Exhibit D" contract was executed was the policy of charging what at all times previously had been universally recognized as "construction charges" brought under this new classification and under the much-extended application of the phrase "operation and maintenance charges." It is thus manifest that the public notice was issued solely under the terms of the "Exhibit D" contract and accordingly not intended to affect the lands of those not a party to it. It is presumed that the Secretary intended to follow the law, not to change it by a play upon words, based

solely upon a stipulation in a contract to which none other was a party.

To sustain appellee's contention would be to hold that the Secretary, by the mere publishing of a notice over his signature, may not only disregard the well-established and judicially recognized distinction between, and application of, the expressions "construction charges" and "operation and maintenance," respectively, but may plow around Section 4 of the Extension Act of August 13, 1914, with its further emphasized inhibition against increasing construction charges without the consent of a majority of the affected landowners, contained in an amendment in the Act of March 3, 1915: (1) by simply changing the prefix to the "charges" account, (2) because the one party (the intervener herein) has agreed to the new designation of the charges, regardless of the wishes of the District, not a party to the new and very extended application of terms.

Exhibit D of the complaint also discloses, among other things, that the intervener (Payette-B. W. U. Asso.) had a suit pending between it and the United States, in which the "advisory" opinion of Judge Deitrich of the Federal court (on which no judgment was entered) reported in 263 Fed., 734; 269 Fed., 159, proved inimical to its contention on important matters there involved. It appears that in order to recuperate to some extent from the effects of this decision, the Association entered into a stipulation with the Government, through the U. S. Reclamation Service, by way of a compromise—instead of appealing the case—whereby some advantages were to accrue to it, and at the same time executed a new contract more satisfactory to the United States. This instrument makes the Government more secure as re-

gards the money returns under the obligations of said Association, from the payment of which, to the extent of several millions of dollars, the Association had been endeavoring by said suit to make its escape. Among other things, intervener's Association was to receive extra benefit by reason of some additional drainage, to secure which it then and there promised to pay for same as "operation and maintenance," thereby conceding and consenting that the drainage costs might be brought within the use of those terms as announced in the public notice of the Secretary (Exhibit C, complaint, Tr. p. 17). The brevity of the interval elapsing between the execution of this contract and the issuance of the public notice, along with other circumstances, reasonably justifies an inference that negotiations had been going on to that effect, leading up to the compromise of this suit in this manner before the public notice was issued, and that the public notice of February 15, 1921, was issued with that end in view and intended to be limited in its application accordingly.

However, after all the concessions thus made by the Water Users' Association—that is to say, its promise to pay all subsequent drainage as "operation and maintenance"—it is but reasonable to assume that the intervener's Association felt little concern about the heavy annual obligations to ensue, so far as early payments were concerned. Section 4 (Tr. p. 23) makes provision for revision of such matters every five years. Section 18 (Tr. p. 25) says, in substance:

> "Well, if a majority don't want to pay this $200,000.00 for canal construction charges, as supplemental construction, we will just pass it over and a proper credit will be allowed at the next readjustment date."

Also, that the landowners, rather than pay the cost of new drainage, would give the necessary *majority* consent, for to do so would spread same over a 20-year period, with probability of the Secretary's permitting the first installment to begin at the expiration of the 20-year period, etc., *ad infinitum*. The surface appearance of generosity in consenting to drainage being called "operation and maintenance" is entitled to little weight. In fact, it would seem that, so far as this feature is concerned, they merely "walked right in" soon to "turn right around and walk right out again."

PUBLIC RECORDS—JUDICIAL COGNIZANCE OF.

The Court may take cognizance of the published records of the proceedings of the Reclamation Service. As before urged, these contracts (Exhibits A and B, Tr. pp. 5 to 13) were executed at a time when the fixed policy of the Reclamation Service was to class building of drainage works only as *construction work*. As held in Baker *vs.* Swigart, *supra*, such matters should be taken into consideration in determining the intent of the authors of the document to be construed. Reference to reports of data, however, happens to be unnecessary. On this feature, attention is directed to that part of Exhibit D of the bill of complaint (Tr. pp. 45-52) containing report of the Director and Chief Engineer, filed as late as December 16, 1922, seven years after appellant's contract, giving a statement of the cost of the entire Boise Project as $12,732,148.56, of which (see grouped items, Main Brief, p. 25) *$927,374.60 was drainage costs* carried on the books, reported and charged against all lands receiving

water within the Project as cost of construction and listed as "construction charges."

What is meant by "construction charges" as distinguished from "operation and maintenance" has also become well understood through a consistent line of decisions covering a long period of time, in the State of Idaho, as well as elsewhere. In the early history of the Service, doubt existed with reference to the authority of the Secretary to construct drainage systems under the Reclamation law. Actions were brought for the purpose of settling that doubt. The Idaho decisions on the subject are collaborated on pages 25, 26 of appellant's main brief. These authorities are cited with approval in *U. S. vs. Ide,* 277 Fed., 382, decided by the Circuit Court of Appeals for the Eighth Circuit, in which the Court observed:

> "It is well settled that the plaintiff may construct drainage works *as a part of its irrigation system.* * * *"

The first case there cited was decided by the Idaho Supreme Court January 4, 1912, the second February 10, 1913.

The case at bar was decided by Judge Deitrich, of the Federal bench, on June 26, 1922, and affirmed by the Court of Appeals on April 23, 1923. On March 3, 1923, the Supreme Court of Idaho, in Nampa-Meridian Irrigation Dist. *vs.* Petrie, 37 Idaho, 45, *held* that expenditures for drainage purposes were "construction charges", following the decision in U. S. *vs.* Ide, 277 Fed., 382, decided December 7, 1921. Yet neither of these cases is referred to by Judge Rudkin in the decision from which this appeal is taken, clearly disclosing that the same were overlooked in his con-

sideration of this question. Nor does Judge Deitrich's attention seem to have been invited thereto.

In U. S. *vs.* Ide, *supra,* special reference is made to drainage works as a part of "the irrigation system", clearly implying that expenditures therefor must be charged as construction. In the Petrie case the Court refers to two of the earlier cases, Pioneer District *vs.* Stone and Nampa-Meridian Dist. *vs.* Petrie, *supra,* and says:

> "There is nothing in the opinions to indicate that the District can charge the cost as an operating assessment and make a flat assessment."

On *rehearing* in the case of Nampa-Mer. Irr. Co. *vs.* Petrie, 37 Idaho, 35, the Court again emphasized its position in a statement to the effect that the respondent there was acting on the theory that the expense of drainage was a part of the maintenance or operation cost, and observed: *"This theory we cannot approve."*

In view of the foregoing considerations, there should be no doubt that the entire course and policy pursued by the Reclamation Service and adopted by the Supreme Court of Idaho was to classify all costs of building drainage systems as "construction charges"; that this policy was in force when contract "A" and *supplemental* contract "B" were entered into by appellant, and therefore must be conclusively presumed to have been so understood by the parties to these contracts; that cases cited disclose this policy as having been recognized by all decisions bearing on the subject *subsequent* to the dates of said contracts, and by all decisions in point *since the date of the issuance of the public notice of* 1917.

Unless, then, there were some provision in the Reclamation law, accepted by the District, authorizing the Secretary to exercise his discretion in this regard and thereby to modify the provisions of the contract, in open disregard of the established and clear understanding in the minds of the parties at the time of its execution, the facts stated in the complaint are sufficient to constitute a cause of action and to merit the relief prayed for. That the Secretary does not have this discretionary power seems too well settled by the authorities cited in complainant's main brief (pp. 12-17) to admit of serious consideration. These authorities should require no further elucidation.

The Public Notice, Like Equity, Must Follow the Law.

In this instance, the public notice sought to evade the law by a change in the terms of expression.

Published official documents of the Interior Department disclose that during the pendency of all cases in which the foregoing decisions were rendered, counsel for the Reclamation Service, including the writer as chief counsel, from March 13, 1913, to June 20, 1920, maintained that the Government under the Reclamation law has implied authority to construct drainage systems in connection with the reclamation projects when deemed necessary, and that the costs of such construction come within the terms "construction charges", not operation and maintenance. All engineers of the service proceeded, and all reports made by them were approved by the Secretary, on that basis. Nor, as stated, was this policy questioned prior to the inception

of negotiations for compromise of intervener's suit, culminating in the "Exhibit D" contract. Under this contract, a new rule was introduced constituting an attempt, whether conscious or otherwise, to evade the law, or—to take a more charitable view—to interject an exception by waiver, as applied to intervener's interest, in order to meet "the exigencies of the occasion".

The public notice itself does not necessarily change the well-established rule invoked by the Department. It is presumed to have been intended to have application in harmony with all outstanding contracts, including the laws of the respective States where invoked; not in contravention to them. Only by contract may these provisions be waived, and thus far the intervener alone has become a party to a contract of that type, and to the intervener alone does the public notice here apply.

Future Drainage Problem, Solution of.

But, we are asked, How shall the Government collect costs in the future for such drainage as was not originally anticipated—in cases of a class of which the execution of appellant's contracts limiting the cost to $70.00 per acre is an example—unless the same may be charged to "annual operation and maintenance" account?

Inquiries on this point would seem to imply that, if our position is tenable, it must follow that the Government can not proceed with further drainage under the contract as it is; nor can the Government proceed under the law, because the securing of the consent of a majority is not feasible, etc.; therefore ,further drainage cannot be had at all. This

premise would seem not unlike the classic syllogism urged by the sophist, seeking to prove motion impossible, on the assumption that "a body cannot move in the place where it is, nor can it move in the place where it is not; *ergo,* it cannot move at all"—overlooking that said body may move from the place where it is at one moment to the place where it is not at another moment.

Thus seems the dilemma here: The Government may not proceed with drainage under Section 4 of the Extension Act (Aug. 13, 1914) and the amendment thereto of March 3, 1915, if the water users, by refusing to consent, choose to continue without drainage; and it cannot proceed with such consent, because consent cannot be obtained; hence the situation, it would seem, must remain *in statu quo.* However, a method by which we may be extricated from this assumed situation is available. Its solution, after mature deliberation, was presented by Congress to the Reclamation Service and to those dealing with it, through the medium of the Reclamation Extension Act. The Act, with amendments, presents an adequate system for securing the necessary consent and for providing the return of the cost of such new and unforeseen necessity for drainage and other construction work which may from time to time be needed. To conjure up such a dilemma, therefore, is but to borrow trouble. The matter is a legislative problem, not a judicial one, and the solution provided by Congress, if insufficient, is not for the courts to change by interpretation—the language of the Act is clear. It is not open to construction.

Under Section 4 of said Act, future drainage systems may be constructed and charged to "supplemental construction". The payments therefor may then be distributed by the

Secretary over the remainder of the 20-year reclamation period, or

> "* * * the Secretary of the Interior, in his discretion, may agree that such increased construction charge shall be paid in additional annual installments * * * (which) as so agreed upon shall become due and payable on Dec. 1 of each year subsequent to the year when the *final* installment of the construction charge under such public notice is due and payable" (38 Stat., 687).

Under this authorized policy, it will be seen that the necessity for charging this cost as "operation and maintenance" is obviated.

It will be found, too, when we take into consideration the human element, how all men naturally proceed when their interests are involved, that these property owners will do what appears to be to their best interest. If drainage is found necessary for the preservation of the land affected, it must follow that the majority will consent, in order that their property may not become worthless. It is not to be presumed that a farmer will saw off the limb between himself and the tree, as would be implied by the assumption above considered. It is but reasonable to presume that the landowners would, as a matter of self-preservation, consent to the construction of drainage in all instances as needed and as rapidly as found essential for the protection of their lands; their immediate necessities always precede or outdistance any serious alarm to the Government in so far as the material endangerment of its securities may be concerned. The farmer never looks with favor upon "hunger strikes".

The reason why the District refuses to pay a share of the costs of building these drainage works is not by way of an exception to the rule of human nature we have just outlined, but consists in the fact that the District declines to pay for the building of drainage works which do not benefit district lands, as shown by the complaint. The rule of human nature as to the saving of property applies in vastly diminished force to the saving of the property of others who seek protection at the expense of the one not to be benefited.

It should be kept in mind that contracts are made by districts where irrigation districts exist; in the other instance they are made by water users' associations. Only through one or the other of these agencies is Government reclamation carried on. Within the districts the District deals with the individual tract of land. The water users' associations deal with the individual landowners as stockholders. The statutory requirement of the consent of the majority, as treated by the Government, has reference in the case of a District to the majority of landowners therein; in case of a water users' association, it has reference to a majority of the stockholders in such association. From this it must follow that a decision of a majority of an association cannot bind any of those in a District, nor the action of a District in this regard have any binding force and effect upon an association.

Units Not Requiring Drainage Should Never be Required to Pay for That Which They do Not Make Necessary and From Which They Receive no Benefit.

The law requiring the landowner's consent is manifestly intended to protect units of a project not needing drainage

from the imposition of costs, as here attempted, for drainage which would in no way benefit them, as the bill of complaint alleges to be the situation in this instance. An inspection of the maps makes it clear that the particular lands upon which the proposed drainage system is to be constructed (the Golden Gate, Wilder Arena and Deer Flat sections or units in the lower half of the Project) are outside of the District; also that the District, when topography of the surrounding territory is considered, can in nowise be benefited thereby.

It is manifest that farmers will not only consent to, but seek, drainage relief at a much earlier date and with less emergency existing therefor, where the payments are to be distributed over a 20-year period in annual installments, *or*, as is frequently done, made to begin at the expiration of the 20-year period, than they would when charged operation and maintenance in addition to the usual operation and maintenance charges essential to the upkeep and running expenses, etc.

The long-term payments, in the exercise of the Secretary's discretion, may begin at the close of the 20-year period without interest. Both the Secretary and the users of water may "give and take" on these matters. Ordinary business prudence would insure the desired consent. It requires little foresight to see that any farmer with average judgment would recognize and accept an advantage which allows him a long term of years in which to begin payments for drainage, rather than sacrifice a home farm which it required years to develop. The long term has "worked" in practice, in every instance where tried; it will continue to "work" successfully where tried in the manner provided by law for that purpose.

But we are reminded, in the opinions of the courts below, that "the prosecution of this suit gives little promise that the consent could be obtained * * *." This assumption is based upon a false premise, especially so when considered in the light of laws enacted by Congress to meet the problem. It implies that men of ordinary prudence will not accept a desired benefit because of its cost, even though obvious that the preservation of their property, its continuous yield of crops, and a proportionate enhancement in farm values may depend upon such acceptance. Humans do not proceed in that way. There is not an instance on record since the enactment of the Reclamation Extension Act to justify such an assumption.

True, in this case the consent is refused. The complaint states adequate reasons therefor, fully justifying the refusal, but it does not follow that when drainage will prove beneficial and essential to the preservation of the farmers' rights they will spurn the benefits afforded under the Extension Act. To apply the reasoning invoked by the courts below is to beg the question; it is to hold that the facts presented are untrue. This in the face of the motion to dismiss, which concedes them. It is to try the case on the extraneous facts, not upon the admitted averments, and, in the opinion of the writer, upon a theoretical assumption of facts not in harmony with the usual business experience among men As to this suit, consent has not been asked in manner pointed out by law. The Secretary's action is not only arbitrary, but imposes upon complainants an annual flat $1.00 per acre assessment to continue for all time *unless the Secretary should eventually conclude otherwise.* The logic of the opinion appealed from—for the reasons suggested why consent of the majority cannot be had—applies with equal force to the Secretary and "gives little promise" in this regard.

The contract limits the cost per acre to $70.00 for construction, including drainage thus far. The law, expressly and in unequivocal terms, guarantees this limitation until a majority of the landowners deem it to their advantage to consent.

Now, the irrigation districts which exist on Government projects, or being adjacent or near thereto, contract with the United States, are the creatures of the States in which their lands lie. They have no method of collecting revenue for building works, paying off bonded indebtedness, defraying debts to the United States, or providing for the operation and maintenance of irrigation and drainage works, except such methods as the local Legislature has provided. In general, and particularly in Idaho, that method is by assessment and levy, similar to the methods of other quasi-municipal corporations.

But it comes about that consent is expected to an unlimited annual flat-rate assessment of $1.00 per acre, regardless of benefits, *in clear violation of the laws of the State* where the lands are situated, which laws require assessment in proportion to the benefit received. As to these benefits, the Idaho courts say:

> "Where the assessment is for drainage, it must be based on benefits derived from it and not benefits derived from irrigation" (Nampa Mer. Irr. Dist *vs.* Petrie, 37 Idaho, 45).

Yet the contract requires the District to collect the assessments, which can only be collected under and in the way provided in the laws of Idaho. But now, six years later, the public notice imposes a charge to meet which requires

an assessment on a basis precluded by the law under which it must be levied—"an irresistible force coming in conflict with an immovable wall."

Furthermore, the Idaho laws say assessments may be made only on a basis of the benefits received. Under the conceded facts, there are no benefits. No assessments, even under the terms of the public notice, are due or can become due. Then, whence comes the authority to shut off the water supply, for which mandatory injunction is here sought? The District is to be left helpless unless this Court afford relief.

The $1.00 per acre demanded under the public notice to prevent the shutting off of the water, is in addition to a large sum per acre, payable annually for the usual operation and maintenance charges. The necessary and admitted *legal* charges have been paid, but another charge is demanded. This addition of $160.00 annually to the farmer's burden is no small item.

To all this, consent is refused by this suit, and we submit that it is unfair to infer therefrom that consent could not be procured from the owners of land benefited, when needed, under the favorable and more practical conditions pointed out in the Extension Act. To meet such emergencies, that Act was passed. The motives of complainants should not be questioned, nor the complaint treated as indicative of a lack of fair dealing because they protest against a procedure demanding that they forego the protection guaranteed them by a law enacted to meet such emergencies, and for the common good, and because they insist upon the rule of fair dealing embodied in the Idaho irrigation district laws, which provision insists that those who benefit from the building of

drainage shall pay for them and shall pay in proportion as their benefit shall appear.

The opinion concedes—quoting with approval from an authority on the subject (Schmidt *vs.* Louisville, C. & L. Ry., 84 S. W., 318)—that

> "There is no rule of law declaring what constitutes operating expenses. That is to be determined by the testimony as to each item of expense and is determinable like every other fact."

This concession, under the *admitted* facts, severs the "limb" upon which the opinion appealed from in part rests. If further data are deemed essential, fully to ascertain whether new proposed drainage expenditures legally come within the provisions of the public notice, the cause should be remanded for that purpose, following thereby the practice invoked in *Kansas vs. Colorado* (185 U. S., 148; 46 Law Ed., 834). To this action, if deemed important, appellant is not averse. The writer, however, is impressed with the thought that the far-reaching effect which the decision in this case may have upon the numerous other and like projects now operating under the reclamation law, and yet to be developed, presents a situation such as to justify an assignment of the case for reargument.

We think that under the facts conceded by the motion to dismiss the decree the Court of Appeals should be reversed and the relief prayed for granted.

Respectfully submitted,

WILL R. KING,
Of Counsel for Appellant.

FOR FURTHER INFORMATION CONCERNING THE BOISE PROJECT AND METHOD OF OBTAINING LAND, WRITE TO THE STATISTICIAN, U. S. RECLAMATION SERVICE, WASHINGTON, D. C., OR OFFICE OF PROJECT MANAGER, BOISE, IDAHO.

DEPARTMENT OF THE INTERIOR
JOHN BARTON PAYNE SECRETARY
UNITED STATES RECLAMATION SERVICE
A. P. DAVIS DIRECTOR
F. E. WEYMOUTH CHIEF ENGINEER

BOISE PROJECT IDAHO

J. B. BOND PROJECT MANAGER
MAP NO. 18400
Prepared in the Washington Office
John H. Pollen Chief Draftsman
SCALE OF MILES
1 0 1 2 3 4 5
1920

INFORMATION OF INTEREST

WATER SUPPLY:

Source of water supply: Boise River.
Area of drainage basin: 2,610 square miles.
Annual run-off in acre-feet of Boise River near Highland (2,610 square miles), 1906 to 1919: Maximum, 3,900,000; minimum, 1,110,000; mean, 2,186,488.

AGRICULTURAL AND CLIMATIC CONDITIONS:

Acreage supplied entirely by Government Water: 150,000 acres.
Acreage supplied with storage water: 126,000 acres.
Length of irrigation season: April 5 to October 5, 181 days.
Average elevation of irrigable area: 2,500 feet above sea level.
Rainfall on irrigable area: At Boise station for 50 years, average 13.51 inches; 1919, 11.46 inches.
Range of temperature on irrigable area: -29° to 111° F.
Character of soil of irrigable area: Clayey loam, light sandy loam, and sandy loam.
Principal products: Alfalfa, wheat, oats, clover, potatoes, apples, prunes, and small fruits.
Principal markets: Boise, Nampa, Caldwell, and Meridian, Idaho; Portland, Oreg.; and eastern cities.

STRUCTURES:

96 concrete structures costing over ..... $2,000 each.
132 concrete structures costing from $600 to $2,000 each.
2,484 concrete structures costing from $100 to $600 each.

LENGTH OF CANALS:

30 miles with capacities greater than 800 second-feet, of which approximately ten miles are lined with concrete; 44 miles with capacities of from 250 to 800 second-feet; 172 miles with capacities of from 50 to 250 second-feet; 730 miles with capacities less than 50 second-feet. In addition to the above there are 288 miles of constructed waste ditches and deep drains.

DAMS:

ARROWROCK: Type - Concrete, gravity and arch. Maximum height - 348.6 feet. Length of crest - 1,100 feet. Volume - 610,000 cubic yards. Cost - $4,750,000.

BOISE DIVERSION: Type - Concrete-masonary, gravity. Maximum height - 68 feet. Length - 550 feet. Volume - 23,749 cubic yards.

LOWER DEER FLAT EMBANKMENT: Type - Earthfill with graveled upstream slope. Maximum height - 55.5 feet. Length - 7,500 feet. Volume - 1,208,000 cubic yards.

UPPER DEER FLAT EMBANKMENT: Type - Earthfill with graveled upstream slope. Maximum height - 72.5 feet. Length - 4,000 feet. Volume - 1,082,274 cubic yards.

RESERVOIRS:

ARROWROCK: Area when full - 3,000 acres. Capacity - 280,000 acre-feet.

DEER FLAT: Area when full - 9,050 acres. Capacity - 177,000 acre-feet.

PROJECT PLAN:

The irrigation plan of the Boise project provides for storage of water in the Arrowrock Reservoir on Boise River, about 22 miles above Boise, and in the Deer Flat Reservoir near Caldwell and Nampa, Idaho; the diversion of water from Boise River by the Boise River Dam, about 8 miles above Boise; the distribution of water on the south side of Boise River, through the Main Canal, leading from the dam to the Deer Flat Reservoir; distributing laterals heading in the Main Canal; distributing canals heading in the Deer Flat Reservoir; and distributing canal systems heading in the Boise River below the Boise River Dam; and the distribution of water on the north side of the Boise River to a small area of land east of Boise through a canal system heading in the Boise River Dam. The United States claims all waste, seepage, spring, and percolating water arising within the project, and proposes to use such water in connection therewith.

EXPLANATION

- CANALS CONSTRUCTED BY THE UNITED STATES
- CANALS NOT CONSTRUCTED BY THE UNITED STATES
- HIGH LAND AREA
- BOUNDARY OF PIONEER IRRIGATION DISTRICT
- BOUNDARY OF NAMPA MERIDIAN IRRIGATION DISTRICT
- BOUNDARY OF SETTLERS IRRIGATION DISTRICT
- BENCH MARK ELEVATION ABOVE SEA LEVEL
- U. S. R. S. TELEPHONE SYSTEM
- WATER MASTER'S HOUSE
- THE PRESENT CAPACITY OF THE CANALS WILL NOT PERMIT PUMPING ONTO HIGH AREAS THUS INDICATED
- CONSTRUCTED DRAINS

NOTE: LANDS BELOW RIVERSIDE CANAL AND NORTH OF IRRIGATION DISTRICTS ARE OUTSIDE OF THE PROJECT

NOTE: THIS SHEET IS A CONVENIENT SIZED REDUCTION OF MAP NO. 18400-A, WHICH IS DOUBLE THIS SCALE AND SHOWS DETAILS MORE CLEARLY. ALSO VIEWS OF BOISE AND ARROWROCK DAMS.
MAP NO. 18400-A MAY BE SECURED FOR TWENTY-FIVE CENTS PER COPY AT THE WASHINGTON OR BOISE OFFICE.